No. 11644.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAMPSON MOTORS, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellee has taken no exceptions to the statement of facts in Appellant's Opening Brief.

The Statement of the Case contained on page 3 of Appellee's brief, reciting that Appellant had stipulated the amount of any judgment which might be rendered, is erroneous. The stipulation appears in Transcript pages 51-54 and is summarized (as to amount) by the statement of Appellant's counsel, on page 54, as follows:

> "Mr. Rosskopf: That is correct. We do not stipulate that that is excess profits or that any part of the amount of money herein involved is excess profits. We do stipulate that if the Court should determine that $60,000 was excess profits the allowance of the tax credit would leave a net balance of $17,176.33. In other words, we stipulate to the arithmetic, if I may put it that way, but *we do not stipulate there is any amount due or that there was any excess profits.*"

ARGUMENT.

I.

Renegotiation Act of 1942 Is Unconstitutional.

Appellee cites the cases of *Spaulding v. Douglas,* 154 F. (2d) 419; *United States v. Pownall,* 159 F. (2d) 73; *Lichter v. U. S.,* 160 F. (2d) 329 and *Alexander v. U. S.* 160 F. (2d) 103 as having already settled all arguments presented in this case.

In the *Spaulding v. Douglas* (154 F. (2d) 419) case, the contractor whose moneys were withheld, took affirmative action to recover the same, alleging they were wrongfully withheld. The burden of proof was there upon the contractor to establish the invalidity of the withholding order; and to prove the prior exhaustion of administrative remedies afforded by the act. The contractor there failed to sustain this burden.

In the case at bar, the contractor took no affirmative action to recover the moneys withheld. The action was instituted by Appellee to recover said moneys. The burden was upon the United States to establish its title to the funds; Appellant was under no compulsion to take an appeal to the Tax Court. This appeal, afforded by the 1943 Amendment to the act was *permissive only,* and provided in Sec. e(2) (50 F. C. A. Apps. 31):

> "* * * any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, (ending before July 1, 1943) as to the existence of excess profits, which is not embodied in an agreement with the contractor or subcontractor, *may,* within ninety days * * * after the date of such deter-

> mination, file a petition with the Tax Court of the United States for a redetermination thereof. *Upon such filing* such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply." (Italics added.)

Appellant, not seeking affirmative relief, was not required to appeal to the Tax Court, but might have done so if it wished. This was the ruling of the trial court. [Tr. p. 57.]

In the case of *United States v. Pownall,* 159 F. (2d) 73, the renegotiation was under the act as amended by the Revenue Act of 1943 (Adopted Feb. 25, 1944) effective for fiscal years ending after June 30, 1943. In the *Pownall* case, the period involved was the "fiscal year ending December 31, 1943." (159 F. (2d) 73.)

In the case at bar, the period involved is the fiscal year ending November 30, 1942, which is governed by the original act, and not by the act as amended in 1944.

The case of *Lichter v. U. S.,* 160 F. (2d) 329 would appear to be almost identical with the case at bar. The Sixth Circuit there held that a contractor, though seeking no affirmative relief, was precluded from raising any except constitutional questions, by reason of not having appealed to the Tax Court. The court there states, concerning test of excessive profits:

> "The present statute is not without such tests, for Sec. 701(b) Act Feb. 25, 1944, requires, in determining excessive profits, that consideration be given."

then sets out the various standards adopted in 1944, as incorporated in section (a) (4) (A) of the act. (160 F. (2d) 332.)

But the 1944 Act (sec. 701(b)) which adopted these standards, specifically provided that such section *"shall be effective only with respect to the fiscal years ending after June 30, 1943."* (50 U. S. C. A. App. 1191, historical note.) (Italics added.)

It is apparent that the court in the *Lichter* case, in giving retroactive effect to said amendment, overlooked the above-quoted language of the act.

We also urge that the conclusion of the Sixth Circuit in the *Lichter* case is erroneous, wherein said court holds that an appeal to the Tax Court is mandatory, if the contractor would preserve his rights to claim his moneys. The discussion of the Court in the *Lichter* case (pp. 330-331) clearly shows the reasoning, but we believe resulted in the wrong conclusion. We urge this court to determine this question for itself, by consideration of the language of Section e(2), in contrast with Section 403(c) which *requires* an appeal to the Tax Court, but which is effective only for fiscal years ending after June 30, 1943. (Sec. 403(c)(6).)

The "day in court" of a litigant should not be denied by implication contrary to the literal meaning of the statute. Any ambiguity should be resolved to protect his rights, rather than to abrogate them. The interpretation in the *Lichter* case sanctions a trap. The appeal to the

Tax Court was added in 1944 (as to fiscal years ending before July 1, 1943), and by its terms was permissive. By the same statute, the appeal was added as to fiscal years ending after June 30, 1943 (Sec. (e) (1)) and *as to the latter section only,* it was provided that if such appeal were not taken,

> "such order shall be final and conclusive, and shall not be subject to review or redetermination by any court or other agency * * *."

By clear statutory language, a penalty is imposed in one case and not the other. Appellant relied on this language and did not take the permissive appeal. It should not now be subjected to the penalty which under the statute clearly did not apply to its case.

The case of *U. S. v. Alexander,* 66 Fed. Supp. 389 (Certiorari denied, 160 F. (2d) 103), is based on the same fallacious reasoning as the *Lichter* case. The contractor is denied the right to raise the questions because of having failed to take an appeal which under the statute he was not required to take. Long after his right of appeal to the Tax Court has expired, a strained construction is placed upon the statute, and he is told that because of his failure to have reached the same strained conclusion, all rights have been cut off. The trap has been sprung, and the contractor has been subjected to a penalty of which he could not reasonably have been aware.

II.
Unilateral Determination Was Void.

As pointed out in Appellant's Opening Brief (p. 15) the Renegotiation Act, as applicable to Appellant's fiscal year ending November 30, 1942, contains no provision for a unilateral determination by the Secretary.

Appellee says such authority should be implied, because the power to negotiate without the power to force his will on the contractor "would be utterly ineffective if the contractor or subcontractor should refuse to agree." (Appellee's Brief, p. 6.)

Appellee also urges that since an appeal from any determination was supplied by the amendment of 1944, this implies authority to make the determination under the law existing before the amendment.

The fallacy of these arguments is self-evident. If the power is not furnished by the statute, it is not implied because it might be more desirable (from the Secetary's standpoint); or by implication from the wording of a later amendment.

III.
There Was No Due Process.

Appellee virtually concedes that Appellant was not afforded due process in the action by the Secretary, but claims that Appellant may not raise the question here. This point has been covered in the previous discussion, and need not be repeated.

A consideration of the matter upon the principles of simple justice should entitle Appellant to a proper hearing.

IV.

The Determination of the Secretary Was Erroneously Considered as Evidence.

No evidence of the action of the Secretary was offered except the Unilateral Determination. The Court received this and treated it as proving the facts recited therein. By a self-serving writing, the burden of proof was shifted to Appellant. The Act applicable here does not even provide for the "Unilateral Determination"; much less that it shall be evidence of the truth of the recitals therein.

V.

Burden Was on the Government.

As in any civil case, the burden of proof was on the plaintiff. Can it sustain this burden by an unauthorized writing which says the government is entitled to recover?

This does not necessarily question the right of the government to recover excess profits in a proper case. However, in order to recover them, they must exist. It is the existence of excess profits which must be determined. This cannot be done by executive decree, but must be done in a proper forum, based upon competent evidence. The act applicable to Appellant authorized a suit in the District Court for that purpose; but did not authorize the Court to accept as evidence, the declaration of the Secretary that such profits exist in a stated amount. At most, it authorized the Court to determine the fact and amount upon proper evidence. No such evidence was introduced.

VI.

Interest Was Improperly Allowed.

As conceded by Appellee, interest is only recoverable when allowed by law. (*Royal Indemnity v. U. S.*, 313 U. S. 289.)

There is no provision in the Renegotiation Act for its allowance.

Conclusion.

The judgment should be reversed. The Renegotiation Act, as applicable to fiscal year ending November 30, 1942, is unconstitutional for the reasons stated.

Should the Act be held constitutional, a proper interpretation of it requires that the question of excess profits be determined by the trial court, upon competent evidence, and the case should be remanded for such purpose.

Respectfully submitted,

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Attorney for Appellant.